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MICHAEL RODAK, JR., CLE

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1976

No. 76-467

RAMSGATE PROPERTIES, INC., NORTH ASSEMBLAGE COMPANY, a partnership, SOUTH ASSEMBLAGE COMPANY, a partnership, and HARRY B. HELMSLEY,

Appellants,

-against-

THE CITY OF NEW YORK,

Appellee.

On Appeal From The Court Of Appeals
Of The State Of New York

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Appellants (the "Owners") submit this brief in opposition to the motion of Appellee City of New York (the "City") to dismiss the appeal herein.*

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* References herein shall be as follows:

"City Fr. Br. "shall refer to the City's brief on its motion to dismiss the appeal in Fred F. French Investing Company, Inc. v. The City of New York, No. 76-460. "City Ram. Br." shall refer to the City's brief on its motion to dismiss the appeal herein.

The City argues that the first question raised in this appeal, i.e., whether the New York City Zoning Amendment effected a compensable taking of the Owners' property, is neither substantial nor final. The question is alleged not to be substantial because "there was no taking" by reason of the fact that the Zoning Amendment "had no practical effect" on the Owners. City Fr. Br., p. 5. The City also states that "[t]here was no evidence that any official action attributable to the enactment impeded the Owners in their use of the land." Ibid. With all due respect, this amounts to begging the question and reversing the findings of the courts below. The New York State Court of Appeals has already held that the Zoning Amendment "deprived the Owners of the reasonable income productive or other private use of their property", 39 N.Y.2d at 591, 385 N.Y.S.2d at 7, "destroys the economic value of the property," and deprives the Owners of their property without due process of law. 39 N.Y.2d at 598, 385 N.Y.S.2d at 12.

It is submitted that it is a substantial constitutional question whether the Owners are thereby entitled to receive any compensation for such an unconstitutional violation of their property rights or whether they can merely be compelled to accept a restoration of the status quo ante. The Court of Appeals has left the Owners without any compensation despite the fact that on its face the Zoning Amendment operated unconstitutionally at least to take their property for a period of more than three years. It is submitted that it is a substantial federal question that the Fifth Amendment provision that private property "shall not be taken for public use without just compensation" has been so interpreted by the courts below.

The City also argues that the judgment below was not final because the parties were still entitled to prove at trial a physical occupation of the property by the City (City Fr. Br., p. 2) and because the New York County Supreme Court had stated on motion for reargument that proof of loss of the Owners' claim of a temporary

taking had to await trial (City Ram. Br., p. 3). The Court of Appeals has held and found that the Owners' constitutional rights were violated and the economic value of their property destroyed by enactment of the Zoning Amendment, but that the Owners' are not entitled to compensation as for a taking. 39 N.Y.2d at 595, 385 N.Y.S.2d at 9-10. This is a final judgment insofar as the Owners are concerned since the Zoning Amendment has been finally construed by the New York State Court of Appeals not to have effected a taking. Nothing further may be done by the Owners in the New York State courts to alter what is the essential holding of this case.

The Owners concede that they have no evidence of governmental occupation of their property other than the enactment of the Zoning Amendment. There is, therefore, nothing to be presented at trial on the question which this Court is being asked to review. That a subsequent trial may determine the amount of damages sustained by the Owners resulting from the temporary taking does not make the judgment below non-final, since

such a proceeding would merely be an accounting, which could just as easily be heard before a referee as a court. Hudson Distributors Inc. v. Eli Lilly & Co., 377 U.S. 386, 389 n. 4 (1964); Local No. 438 v. Curry, 371 U.S. 542, 549 (1963).

The City argues that this Court may not review the additional question presented as to whether the Owners are entitled to damages as for a temporary taking because this question was not "properly raised nor expressly decided" below. City Ram. Br., p. 3. The Owners' jurisdictional statement in this appeal shows that this issue has been raised at every stage of the proceedings below. The motions for reargument in the New York County Supreme Court and the Court of Appeals specifically were addressed to the temporary taking question only because those courts had failed to deal with the question when the issue had been presented to them in the first instance. The City itself recognizes this to be the case since it concedes that the issue was raised in oral argument before the Court of Appeals. City

Ram. Br., pp. 6-7. The City's effort to characterize the issue as a tort claim by the Owners for damages rather than as a claim for a temporary taking is an exercise in semantics, both claims being the same. The damages which result from the enactment of legislation which destroys the economic value of property are the same, after all, as the value of the property which has been taken from its owner while such legislation is in effect. This was recognized in Keystone Associates v. State of New York, 39 A.D.2d 176, 333 N.Y.S.2d 27 (3rd Dept. 1972), aff'd, 33 N.Y.2d 848, 352 N.Y.S. 194, 307 N.E.2d 254 (1973), where the Appellate Division, Third Department, used the terms interchangeably. The Owners understood this to be the case, and, it is submitted, the Court of Appeals did, when the City asked for a declaration that the Owners were not entitled to such damages.

In reality, there is only one question to be decided by the Court -- whether the restoration of the prior zoning classification by the courts below meets the standard of the Fifth Amendment

that private property shall not be taken for public use "without just compensation". It is submitted that the Court's consideration only of the question whether the enactment of the Zoning Amendment has given rise to a permanent taking will give an incomplete answer to the question and will leave the parties in doubt as to their rights.

CONCLUSION

The motion to dismiss should be denied and probable jurisdiction should be noted.

Dated: New York, New York
November 3, 1976

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